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135, and *Sims v. Hundley*, 6 How. 1, and as these cases show that the issues of fact are immaterial, though found for the defendant, the defence will probably turn wholly on the decision of the point raised by the demurrer.

The judgment of the Circuit Court is reversed.

Order

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

THOMAS TOWNSEND, PLAINTIFF IN ERROR, v. ROBERT JEMISON.

Although, as a general rule, all issues, whether of law or fact, ought to be disposed of in some way by the court below, yet, under the particular circumstances of this case, which presented the appearance upon the record of a demurrer which had not been disposed of, this court will presume that the demurrer had been withdrawn or overruled.

The thirty-second section of the Judiciary Act (1 Stat. at Large, 91) forbids a reversal of the judgment on account of the omission of the clerk to record such waiver or overruling.

The statutes of jeofails examined.

Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of. A statute of Mississippi, where the cause was tried, allows one good count to sustain a judgment.

Where the plea was bad, and the demurrer was to a replication to this bad plea, the first fault in pleading was committed by the defendant, and judgment against him was properly given.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

It was a suit brought by Jemison against Townsend, to recover a sum of money which Jemison had paid for him to the Mississippi Union Bank, at Macon. The consideration appears to have been, that Townsend should take up a note at the Commercial Bank of Columbus, for which he, Townsend, was bound for one John B. Jones; but in what manner Townsend's taking up the latter note would benefit Jemison did not appear from any part of the record.

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On the 21st of May, 1842, the suit was commenced by issuing a summons, which was indorsed as follows:—

“This action of assumpsit is brought to recover the sum of \$4,000, with interest at 10 per cent., (paid for defendant,) from 27th January, 1840, to Mississippi Union Bank; defendant agreed to pay for plaintiff same amount in the Commercial Bank of Columbus, Mississippi, in consideration that plaintiff would pay same amount for him to the Mississippi Union Bank at Macon; this action is brought to recover said sum of money, defendant having failed to comply with his promise.

“HARRIS & HARRISON, *Plaintiff's Attorneys.*”

The declaration originally filed was amended, and on the 6th of December, 1842, the amended declaration was filed, which contained three special counts and the general money counts. The first of the three special counts was as follows, the other two being similar in substance.

“Robert Jemison, who is a citizen of the State of Alabama, by leave of the court for that purpose first had and obtained, by attorney, complains of Thomas Townsend, who is a citizen of the Northern District of the State of Mississippi, and who was summoned to answer the said plaintiff of a plea of trespass on the case in assumpsit. For that whereas, heretofore, to wit, on the 20th day of March, A. D. 1840, at, to wit, in said district, in consideration that the said defendant was then and there bound, and liable by note in writing, to the Commercial Bank of Columbus, Mississippi, for one John B. Jones, as his security for about the sum of nine thousand eight hundred and six $\frac{2}{100}$ dollars, besides interest thereon; and was also indebted to the Mississippi Union Bank, at its branch in Macon, in the county of Noxubee, about the sum of three thousand dollars, on a note of four thousand dollars, executed by the said defendant and others, payable at Jackson, at the banking-house of the said Mississippi Union Bank, at Jackson; and in consideration that the said plaintiff would take up the said last-mentioned note to the Mississippi Union Bank, and would also take up the note of the said Jones in the Commercial Bank of Columbus, Mississippi, on which the said Townsend was liable as security as aforesaid, except an amount equal to the amount of said Townsend's liability to the said Mississippi Union Bank, and release the said Townsend from the balance of his said liability to the said Commercial Bank, he, the said defendant, then and there agreed with the said plaintiff, to pay on his said liability, in the said Commercial Bank of Columbus, Mississippi, the same amount which the said plaintiff might take up for him, the said Townsend, in the said Mississippi Union Bank.

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And the said plaintiff avers, that afterwards, to wit, on the 10th day of May, in the year 1840, he did take up the said Townsend's note, in the said Mississippi Union Bank above stated, according to the said agreement, amounting to the sum of three thousand and ninety $\frac{4}{100}$ dollars. And the said plaintiff further avers, that he did then and there, to wit, on the same day and year last named, at, to wit, in said district, take up the notes of the said John B. Jones, in the said Commercial Bank of Columbus, Mississippi, on which the said Townsend was security as aforesaid, according to his said agreement. And the said plaintiff in fact says," &c., &c.

The subsequent pleadings were as follows : —

" And the said defendant, by attorney, comes and defends the wrong and injury, when, &c., and says he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him ; and of this he puts himself upon the country, &c.

" COCKE, SMITH, & GHOLSON, *for Defendant.*"

" And the plaintiff doth the like.

" HARRIS & HARRISON, *Plaintiff's Attorneys.*"

" And for further plea in this behalf, the said defendant, as to the first, second, and third counts of the said declaration, says, that the said plaintiff ought not to have or maintain his action, because he says that, by an act to prevent frauds and perjuries, it is enacted, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of any other person, unless such promise or agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized. And the said defendant avers, that the said plaintiff hath brought his action to charge the defendant for the debt of John B. Jones, and for no other purpose whatever ; and that there is no agreement in writing touching the promise of the said defendant, as alleged in said counts of said declaration, to answer for the debt of the said John B. Jones, or any memorandum or note thereof signed by the said defendant, or any other person by him thereunto lawfully authorized. And this he is ready to verify, wherefore he prays judgment, &c.

" COCKE, SMITH, & GHOLSON, *for Defendant.*"

Plaintiff's replication to defendant's above-stated pleas, filed at December term, 1842, in the words and figures following, to wit : —

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"The United States of America, District Court for Northern District of Mississippi, December term, 1842:

"ROBERT JEMISON
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"And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, saith, that he, the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him, the said defendant, because he says that he, the said plaintiff, hath not brought his action to charge the said defendant for the debt of John B. Jones, and for no other purpose whatever; but that the said action is brought to charge the said defendant upon his said several original promises and undertakings, founded upon the said several new and sufficient considerations in the said count of said declaration stated and set forth; and this he prays may be inquired of by the country.

"HARRIS & HARRISON, *Plaintiff's Attorneys*."

Defendant's demurrer to plaintiff's replication, filed at December term, 1842, in the words and figures following, to wit:—

"And the said defendant saith, that the said replication of the said plaintiff to the said second plea of the said defendant is not sufficient in law for the said plaintiff to have or maintain his action aforesaid; and this he is ready to verify; wherefore he prays judgment, &c. GHOLSON & SMITH, *for Defendant*."

In this condition of the pleadings, it appeared by the record that the parties went to trial, when the jury found a verdict for the plaintiff, assessing his damages at \$ 3,451.88.

The trial took place on the 12th of December, 1842.

An execution was issued upon the judgment, then an *alias*, a *pluries*, and an *alias pluries*.

On the 5th of June, 1845, a writ of error was sued out, which brought the case up to this court.

It was argued by *Mr. Cocke*, for the plaintiff in error. His argument was as follows.

This is a writ of error to the Circuit Court of the United States for the Northern District of Mississippi. The facts may be briefly stated to be these. Jemison, the defendant in error, instituted an action of assumpsit in the court below against Townsend, to recover the sum of three thousand and ninety dollars and forty-one cents, which Jemison paid for Townsend to the Mississippi Union Bank, upon the agreement of Townsend

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to pay the same amount for Jemison to the Commercial Bank of Columbus, Mississippi, upon a note of one John B. Jones, upon which Townsend was indorser for Jones. In the declaration filed at the June term of said court, 1842, there is a special count, to which is added the usual money counts. There is a demurrer to the special count, — 1st, because there is no legal cause of action set out; 2d, because no legal breach is designated; and to the money counts *non assumpsit* was pleaded. The court below made no disposition of the demurrer, but gave leave to the parties to amend their pleadings at the next term. Jemison filed an amended declaration, containing three special counts on the above facts, placing them under different phases, and also adding the usual money counts; *non assumpsit* was pleaded to the money counts, and to the special counts was pleaded the statute of frauds and perjuries. There was a special replication to the last plea pleaded, to which the defendant demurred, and the court below tried the cause without making any disposition of the demurrer, and permitted the plaintiff below to proceed to final judgment over the demurrer. The case being tried in Mississippi, it is believed the rule governing such cases in that State should prevail. The regularity of these proceedings being the subject of inquiry on behalf of the plaintiff in error, we maintain, — 1st. That the statute of frauds and perjuries pleaded is a full and conclusive defence to the matters alleged in the declaration. 2d. That the demurrer to the replication raised the question of the sufficiency of the matters contained in the whole declaration in law to charge the defendant upon the agreement set out; and it was error in the court below to have permitted the plaintiff to proceed to final judgment while the demurrer was pending and undetermined. 3d. That the defendant was entitled to his judgment in the court below upon his demurrer. Let us examine, first, the three several counts contained in the declaration. The first count is as follows, in substance: — In consideration that defendant was liable, by note, as security for one John B. Jones to the Commercial Bank of Columbus for about \$9,806.50, and was indebted to the Mississippi Union Bank about \$3,000 on a note of \$4,000, and in consideration that plaintiff would take up said last note to the Union Bank, and would also take up said Jones's in the Commercial Bank, except an amount equal to the amount of defendant's liability to the Union Bank, and relieve defendant from the balance of said debt to the Commercial Bank, defendant agreed with and promised plaintiff to pay, on his, defendant's, liability to the Commercial Bank, the amount which plaintiff might take up for him, defendant, in the Union Bank; and that plaintiff did

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take up defendant's note in the Union Bank to the amount of three thousand and ninety $\frac{4}{100}$ dollars, and did take up said note to the Commercial Bank, and defendant has never paid plaintiff nor the Commercial Bank. To this count the defendant pleaded that the plaintiff's action was brought to charge him upon a promise to pay him the debt of John B. Jones, and that the statute of frauds and perjuries—How. and Hutch. Miss. Digest, 370, 371—barred any such action on such promise. To this plea the plaintiff replead, and, by his replication, denies that the count is on a promise to pay Jones's debt. To which the defendant demurs, and for good cause; for the defendant's promise to pay so much of Jones's debt, contained in the declaration, is clearly a promise to pay the debt of another person, within the statute of frauds and perjuries aforesaid. The replication denies that the count is brought on any such promise, and thus the replication denies the count itself, and is as good a defence as the defendant could have desired. What better defence could he ask than that the plaintiff should, by his own pleadings, deny the cause of action set out in the count? For this reason, the demurrer was well taken, and should have been sustained. But again, in support of the demurrer, the plaintiff shows that he himself took up the whole debt to the Commercial Bank, when the contract set out was that he was to take up a part thereof only, and was to leave such part as was equal to the amount paid to the Union Bank by plaintiff, to be paid by defendant to the Commercial Bank. Townsend's promise was to pay that amount to the Commercial Bank upon Jones's debt, and not to pay the plaintiff by taking up the whole of Jones's debt to the Commercial Bank. Plaintiff put it out of defendant's power to pay the Commercial Bank. He relates the contract set out, and then seeks to recover damages of defendant for a breach which was brought about by his own breach of the contract first committed. Again, it was Jones's debt that plaintiff took up. Thus, in direct violation of the agreement, Jones was the principal in the note at the Commercial Bank, and, as such, was, under the statute of this State, first liable directly for the payment of the note, either to the bank or the plaintiff. Townsend being a mere accommodation security for Jones, the bank could not hold Townsend responsible for the money until Jones had been pursued to insolvency; and if the bank cannot, how can Jemison hold Townsend responsible, until he first fail to collect it from Jones? The count shows that Townsend was a mere indorser for Jones, and Jones being first directly liable to pay the Commercial Bank debt, for aught that appears to the contrary he may have paid the plaintiff the whole amount of said note.

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As the plaintiff voluntarily took that amount of the Commercial Bank debt which, by his contract, he was bound to have left to be paid by the defendant, he has placed it out of the power of the defendant to comply; let him seek his remedy on the note, and not bring his action to recover damages for a breach which he himself was the cause of. The demurrer was good as to the replication and first count, and yet the plaintiff passed the demurrer in the court below unnoticed, and the court permitted him to proceed to judgment without joinder in the demurrer, and without making any disposition of it. If the demurrer was well taken, judgment should have been for the defendant; if not, a judgment of *respondeat ouster* ought to have been entered by the action of the court; the defendant below could not take issue on the replication. See How. and Hutch. Digest, 616; Revised Code of Mississippi, 120; Walker v. Walker, 6 How. (Miss.) 500; Bright v. Rowland, 3 ib. 415; Davis v. Singleton, 2 ib. 681; Brown v. Smith, 5 ib. 387. The second count states, that, in consideration that the defendant was bound to the Commercial Bank, by note, as security for Jones, and was also indebted to the Mississippi Union Bank in the sum of three thousand dollars on a note for four thousand dollars, and in consideration that plaintiff would take up the note in the Union Bank, defendant promised plaintiff to pay same amount on said note in said Commercial Bank, and plaintiff did take up said note of defendant in said Union Bank, and paid the sum of three thousand and ninety $\frac{11}{100}$ dollars; yet defendant has not yet paid the Commercial Bank on said note of John B. Jones, on which defendant is liable as aforesaid. To this the above plea was pleaded, also, that the promise declared on was to pay the debt of another, and that the statute of frauds and perjuries aforesaid was a bar. And to said plea plaintiff also replead, and by the replication denied that the promise declared on was a promise to pay the debt of Jones; and thus the plaintiff denies his own second count. And thereupon the defendant demurs, as well he might. The defendant could have no better defence than the denial of the plaintiff of his own cause of action; and, upon such denial, the defendant rightfully demurred to any further answer. See the same authorities. Again, has plaintiff ever sustained any injury by reason of defendant's failure to pay Jones's debt? It is a matter of no moment to plaintiff whether defendant paid or whether Jones paid, or whether Jones's debt was paid at all; he shows no affinity between himself and Jones, or Jones's debt, whereby the payment would have been an advantage, or the non-payment a disadvantage, to plaintiff. How could the failure of defendant to pay a debt to Commercial Bank for which he, as

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the security of Jones, owed said bank, affect the plaintiff, who was a stranger to said debt? The Commercial Bank is competent to take care of its own matters; and the declaration does not show that plaintiff was guardian or trustee for said bank, or that he was in any wise interested in the payment of a debt due to it. If the plaintiff has taken up defendant's note to the Union Bank, let him sue on the note, and not seek to recover damages when he could not possibly sustain any, by reason of the non-payment by defendant to Commercial Bank of said note to Jones. The third count states that defendant, in consideration that he was indebted to the Union Bank by several notes; and in consideration that he was liable for John B. Jones to Commercial Bank for about \$ 9,806.50, and in consideration that plaintiff would take up any or all of said notes in the Union Bank, agreed with plaintiff to pay to the credit of defendant's note in the Commercial Bank, on which he was security for Jones, whatever sum plaintiff should pay to the Union Bank in taking up the liabilities of said defendant in the Union Bank; and the plaintiff has taken up defendant's liabilities to the Union Bank to the amount of \$ 8,000, and yet the defendant has not paid the Commercial Bank same amount of money, but refuses to pay same. If defendant has refused to pay the Commercial Bank, is plaintiff injured thereby? If he has not paid, he is still bound to pay; and whatever he has paid or has not paid, or is bound or is not bound, does not in any wise affect the plaintiff. The Commercial Bank may have forgiven the debt, or cancelled the notes, or Jones may have paid it; and whether the bank forgave the debt or not, or whether it be cancelled or not, in no wise affects the plaintiff. If defendant had paid the Commercial Bank, as he was already bound to do as the security of Jones, Jemison would not have been any better off; and if defendant has not paid the Commercial Bank, it is the bank's own affair whether it is ever paid, and to Jemison it matters not whether it is ever paid. The three counts are wholly void of any cause of action; if the plaintiff has paid money for defendant, let him sue for it, but not seek to recover damages for the breach of a promise to pay the Commercial Bank a debt which the defendant was already bound to pay by his promissory note, and to pay which a promise to Jemison, who was a perfect stranger as to the debt due to the Commercial Bank, creates no new obligation. As to the other counts for money had and advanced, money paid, laid out, and expended, and for money had and received, they do not sustain any action, because plaintiff hath appended thereto no bill of particulars, except a promissory note made by defendant and others to the Union Bank. Plaintiff can give nothing in

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evidence, under the common counts, except what is contained in his bill of particulars. See Statutes of Mississippi, How. and Hutch. Digest, 590. And he cannot give his note in evidence under said count, because it is a note given to the Union Bank by defendant and others, and, by the act of the Mississippi legislature, the bank could not assign this note. See Laws of 1840, p. 16; 3 Smedes & Marsh. 661. Here, by virtue of this law, Jemison could get no such interest in the note as to authorize him to sue him in his own name; for, in fact, no title passed to him in the note; the note is not negotiable nor assignable or transferable hereby. Then the court could not permit him to practise a fraud upon the law by waiving his action on the note, and use it in evidence to sustain a right of action against the defendant, where he holds the note itself in direct and known violation of the statute; this note is still the property of the Union Bank. There being no bill of particulars filed by plaintiff, except this note, and not being lawfully possessed of it, it was not properly introduced into the bill of particulars, and for the want of such a bill of particulars as the law requires, the common counts in the declaration are wholly void of any right of action; and it was error to admit the note under the money counts; the bank could not assign the note, because it is against the law of the State. The Supreme Court will reverse a judgment obtained upon a contract entered into in violation of the statutes of the State. See 2 Peters, 539. Suppose Townsend had paid the note, he is bound to know the law, that the bank could not assign his note, and could recover the amount of the debt again of him, if he pays it to plaintiff. See also 4 Peters, 410. We therefore contend that the judgment should be reversed, and judgment rendered for Townsend on his demurrer.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was assumpsit. Though the declaration contained several counts, some on a special promise and some for money paid and received, it was indorsed on the original summons, that the action was "brought to recover the sum of \$4,000 and interest at 10 per cent., paid for defendant, from 27th of January, 1840, to Mississippi Union Bank," &c., &c.

There was a demurrer and other pleadings as to this declaration, which it is not necessary to repeat, as leave was given to amend throughout; and on the 6th of December, 1842, a new declaration was filed, consisting of three special counts and the usual money counts, all of which must of course be for the original cause of action.

On the 9th of December, 1842, the defendant pleaded the

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general issue of *non assumpsit* to the whole declaration; and, for further plea to the three special counts, averred, that the suit was brought to charge him for the debt of John B. Jones, and for no other purpose, and that, there being no evidence of his promise in writing, the suit was barred by the statute of frauds and perjuries. To this the plaintiff replied, that the suit was not so brought, but on original promises made by the defendant. The latter filed a general demurrer to this replication.

On the 12th of December the general issue joined as to the whole declaration appears to have been tried, and a verdict returned for \$ 3,451.88, for which sum, at the same term, judgment was rendered and execution issued.

Nothing further took place till June 5th, 1845, when this writ of error was brought to reverse the judgment, assigning as the ground for it, that the demurrer to the replication should first have been disposed of, and that the statute of frauds pleaded in the preceding plea was a full defence to the matters alleged by the original plaintiff.

This case presents some questions of practice and of pleading which possess no little difficulty. They must be settled chiefly by the reasons which may be applicable to them; and when precedents in this court are not found for a guide in aid of those reasons, they may be strengthened by analogies established in the State courts or in England, where the systems of pleading and practice are somewhat similar. It seems proper, and is conceded, that, in a cause where several pleas are filed, as here, and some terminate in a demurrer and others in an issue to the jury, they should all, as a general rule, unless waived or withdrawn, be in some way disposed of by the court. The leading inquiry, then, is, if enough appears in all the proceedings here to render it probable that the issue, in law no less than in fact, was in some way disposed of, though this is not, *eo nomine*, mentioned in the record. Assuredly, it is usual in this country, as a matter of practice, when there is an issue of fact and another of law in the same action, to have the question of law heard and decided first. *Green v. Dulany*, 2 Munf. 518; *Muldrow v. McLelland*, 1 Litt. 4; Co. Litt. 72. a; Com. Dig., *Pleader, Demurrer*, 22. The 28th rule for the Circuit Courts accords with this, by directing that, in such cases, "the demurrer shall, unless the court shall otherwise, for good cause, direct, be first argued and determined," because a decision on that, if one way, that is, if in favor of the demurrer, will frequently dispose of the whole cause, and supersede the expense and necessity of a jury trial of the other issue, as well as give an opportunity to move for an amendment. 5 Bac. Abr., *Pleas and Pleading*, No. 1; *Tidd's Pract.* 476; *Dubery v. Paige*, 2 D. & E. 394. Yet this course

being a matter of sound discretion in the court rather than of fixed or inflexible right, it cannot always be absolutely presumed to have been pursued. See 28th Rule, *ante*, and cases before cited; 2 D. & E. 394; 1 Saunders, 80, note 1. But as it is usual, and the defendant in this case did not file any exception, as if there had been a refusal by the court to decide first on the demurrer, the presumption does not seem so strong that there had been a refusal or neglect to do it, as that the demurrer had been waived by the defendant, or, if not waived, had been decided, and the particular minute of this on the record omitted by a mistake of the clerk. Several other circumstances exist, which, in connection with these, contribute to strengthen this last presumption, and to justify us on legal grounds in inferring that one of the above events, either a waiver or decision of the demurrer, actually took place here. First, as to those in favor of the position that the demurrer was waived. Only one cause of action existed here, though set out in several counts. This is stated, not only, as before mentioned, in the summons by the original plaintiff, but by the defendant in his special plea, and in the argument of his counsel. The general issue, which was joined and tried, went to the whole declaration; and under that, at the trial, any parol evidence offered in its support could have been objected to as within the statute of frauds, which seems to have been the whole defence, as well as under the special plea setting up this statute against the special counts. This is clear from the books of practice. 1 Chit. Pl. 515; 2 Leigh's N. P. 1066; 1 Tidd's Pract. 646. Though, to be sure, it could be pleaded specially, also, and this may now be necessary under the new rules of court in England. 1 Bingh. N. C. 781; 2 Crompt., Mees., & Rose. 627. Hence, from abundant caution lest this objection might not be admissible under the general issue, the special plea here was probably at first filed. But before the trial came on, which was three days after, it is likely that the defendant had become convinced that it was admissible, under the general issue, and therefore went to trial without having the demurrer first argued and decided, or even joined, but waived it. If, on the contrary, he concluded to try the issue to the jury first, and then, if not allowed, there to make his objection as to the statute, to argue the demurrer afterwards, the inference would be equally strong, that he was allowed to urge the objection at the trial, and had a decision on it there, and therefore waived his special plea and demurrer, and a separate and unnecessary decision on them, afterwards. Such was the presumption in the case of Bond v. Hills, 3 Stewart (Alabama), 283, more fully explained hereafter. It was held likewise in Morrison v. Morrison, 3 Stewart,

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444, that if a demurrer and an issue of fact were to the same matter, and the latter was tried first, it must be presumed that the other had been waived.

In *Dufan v. Coupfrey's Heirs*, 6 Peters, 170, a writ of error was brought, for the same general cause as here, that one of the pleas intended for the court did not appear by the record to have been decided. But the court sustained the judgment below; the other plea, on examination, as will soon be shown to be the case here, being found immaterial after the finding of the jury. Where one material issue is decided going to the whole declaration, it is of no consequence how an immaterial issue going only to a part of it is found, if no injury be done by it to either party. 6 Missouri, 544. And by parity of reasoning, it would be of no consequence whether it was decided at all or not, if enough else is decided to dispose properly of the whole case.

What fortifies these views is the fact, that the defendant never procured a joinder to his demurrer by the plaintiff. As he interposed this defence in a special plea, and filed the demurrer to the replication, it would be material for him, if wanting a decision on them, to get the pleadings finished. He should have moved for a joinder, or got a rule for one, (1 Chit. Pl. 628,) and should likewise have moved for a decision on them, if desired, before a final judgment was rendered on the verdict. It is true that some books appear to consider it the duty of the plaintiff to join in a demurrer soon after it has been tendered by the defendant. But this, it is believed, generally depends on a positive rule of court, which may exist, to require it. 33d Rule of Practice for Courts of Equity, 1 How. 43; *Williams's case*, Skinner, 217. And without such rule, as in this case, he may need and take time to decide on making a motion to amend, before joining; and the harshest penalty proper for delay in the joinder would seem to be, that the demurrer may be considered, when requested by the party making it, though no formal joinder has taken place. 3 Levinz, 222; Skinner, 217. The omission of the defendant, then, to obtain a joinder, to which he was by law entitled, (1 Chit. 647; Barnes, 163,) the omission to add one himself, which is sometimes permissible, (5 Taunt. 164, and 1 Pike (Ark.), 180,) and the omission to request a decision without any joinder, as he may after much delay, (Skinner, 217,) all appear on the record, and look not only like a waiver of a decision on the demurrer by the defendant, but a neglect of his own duties on the subject. A waiver of a demurrer often takes place, and is, by law, permissible. 1 Tidd's Pr. 710; 1 East, 135; 2 Bibb, 12; 1 Burrow, 321; 2 Strange, 1181. *Quilibet renuntiare potest jure*

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pro se introducto. The want of a decision would, in this aspect of the subject, seem to be by his own consent; and *consensus tollit errorem*. The course of the defendant appears to have been, practically and substantially, if not formally, an abandonment of a wish for any separate decision on the demurrer. See cases of this kind. *Wright et al. v. Hollingsworth*, 1 Peters, 165; *Bac. Abr., Error*, K. 5; *Vaiden v. Bell*, 3 Randolph, 448; *Patrick v. Conrad*, 3 Marsh. 613; 2 Marsh. 227; *Casky v. January*, Hardin, 539. As a plea of the general issue, while a demurrer is pending undisposed of, is considered a waiver of it. *Cobb v. Ingalls*, Breese, 180.

In another view of the subject, looking to the defendant's own neglect as the cause, a party cannot be allowed to take advantage of his own wrong or inattention. Thus it has been decided, that a writ of error will not lie for one's own neglect or irregularity. 1 McCord, 205; 1 Pike (Ark.), 90; *Kincaid v. Higgins*, 1 Bibb, 396; 2 Blackf. 71; 3 McCord, 302, 477; *Kyle v. Hayle*, 6 Missouri, 544. It strengthens these conclusions, that the original defendant seems to have long acquiesced in what he now excepts to, — that he does not appear to have asked for a decision on the demurrer, to have made any complaint at the time of the demurrer not being decided, to have filed any motion about it, offered any bill of exceptions, or even brought any writ of error, till after the lapse of nearly three years. So much as to the waiver of the demurrer. But if the demurrer was not, in truth, waived or withdrawn by the defendant, or cannot be now so considered, from all which appears on the record, the presumption from all is evident, that the demurrer and special plea were actually decided on by the court, and the omission to enter it on the record may be cured by the statute of jeofails. Such a decision would have been its ordinary and proper course of proceeding.

This court has held, in a state of things much like this, as will soon be more fully explained, that it was bound to presume that "justice was administered in the ordinary form." 4 How. 167. And hence, in 3 Stewart, (Alabama,) 447, 448, where a decree was averred in the record, but not its form, it was presumed to have been in the ordinary form. The court could not properly have decided and given judgment for the plaintiff in this case, as it did, and, as must be presumed, properly, in the first instance, if the demurrer had not been waived or settled in favor of the plaintiff. Nor was the defendant likely to have acquiesced in the judgment without putting an exception on the record, unless one of these circumstances had occurred. This question has arisen in several of the States, and been decided in conformity with these views. In the case of *Cochran's*

Executors v. Davis, 5 Litt. 129, the court very properly adopt a like principle, saying, — "To this plea there was a demurrer, and although there is no order of record expressly disposing of the demurrer, yet, as the court gave judgment for the plaintiff on the whole record, it must be taken that the demurrer was sustained and the plea overruled." So in substance it was held in *McCullom v. Hogan*, 1 Alabama, 515; and in *Bond v. Hills*, 3 Stewart, 283, where, as in this case, there was a plea, amounting to the general issue, or containing what was admissible under it, and it did not appear distinctly to have been disposed of, but the general issue was tried, it was held to be presumed that the defendant had the full benefit of the objection on the trial, and error will not lie. It is true that where one issue in a cause is found one way and another on a matter entirely distinct is not disposed of, it may not be proper always to consider it as decided. *Pratt v. Payne*, 5 Missouri, 51. But here the questions involved in both issues were the same; both related to the same cause of action, and both to the same defence. The cases on this subject are so much more numerous in the States than in England or in this court, that we oftener find it necessary to resort to them for analogies in support of our reasoning as to what should, under all the facts, be presumed. But in this court, at this very term, we have a strong illustration of the correctness or truth of such a presumption, in the case of *Harris v. Wall*; where, on similar findings by a jury on some pleas and a demurrer to others, and a judgment for the defendant without any entry made specifically that the demurrer was disposed of, it happens, in point of fact, that it was decided, and the judge on that circuit, now present, has with him his written opinion, which he delivered when deciding it. So in *Stockton et al. v. Bishop*, 4 Howard, 167, in a writ of error, where a verdict appeared and a judgment, but not for any particular sum, with several other important omissions, this court, by Catron, Justice, remarked, — "Still we are bound to presume, in favor of proceedings in a court having jurisdiction of the parties and subject-matter, that justice was administered in the ordinary form when so much appears as is found in this imperfect record."

Again, on a writ of error, many things will always be presumed or intended, in law as well as fact, to have happened, which are not *ipsissimis verbis* or substantively so set out on the record, but are plainly to be inferred to have happened from what is set out. *Cro. Eliz.* 467; 4 Howard, 166. Thus, in this case, numerous circumstances stated on the record, and already referred to, indicate that the demurrer and special plea, if not withdrawn or waived, were actually disposed of. Among

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them, raising a strong presumption that way, is the fact, that three days elapsed after the pleas and demurrer were filed, before the trial of the other issue; that within this period the court had time to hear the question of law argued; that it is the usual practice to hear such a question before going to a trial of the facts; and hence, unless the demurrer was waived, that the court, before the trial, did probably hear and decide the demurrer against the defendant. Again, the court would have been still less likely to have proceeded to final judgment without first disposing of the question of law, unless waived or settled either before, at, or after the trial. Such, too, being the duty of the court, they are to be presumed, till the contrary appears, to have done their duty. *Wilkes v. Dinsman*, *ante*, 89. Nor is such a presumption here, as some have suggested, against the record; because the record says nothing on the subject. But it is consistent with every thing that is there said, and with what is fairly to be inferred from the whole record, carrying with us the probable idea, in that event, of some omission or misprision by the clerk in noting all which happened.

The omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver, if it was abandoned, would be merely a clerical mistake; and it is well settled at common law, that a misprision by a clerk, if the case be clearly that alone, though it consist of the omission of an important word or expression, is not a good ground to reverse a judgment, where substance enough appears to show that all which was proper and required was properly done. *Willoughby v. Gray*, Cro. Eliz. 467; *Weston's case*, 11 Mass. 417. The statutes of jeofails usually go still further in remedying defects after verdicts and judgments. Considering this, under those statutes, as a case of defect or want of form in the entry by the clerk, and not of error in the real doings of the court, the statute of jeofails of the United States, curing all defects or want of form in judgments, is explicit against our reversing this for such a cause. Sec. 32 of Judiciary Act of 1789, 1 Stat. at Large, 91. If the State laws are to govern, the words of the statute of jeofails are equally explicit and more minute in Mississippi, in curing such defects, resembling more the English statutes. *Hutchinson's Code for Mississippi*, 841. It is not a little singular, that the unwillingness in England to have judgments disturbed by writs of error for defects in them or in the prior pleadings, where a verdict of a jury has been rendered for a plaintiff, is such, that something like five or six acts of Parliament were passed before our ancestors emigrated hither, and several more since, to prevent writs of error from being maintained for defects in form, as well as to empower amend-

ments in such cases. See those in 1 Bac. Abr., *Amendment and Jeofails*; O'Driscoll v. McBurney, 2 Nott & McCord, 58. Some of the defects cured seem to be very near as strong as the present case. 11 Coke, 6. b; Act of 32 Hen. VIII. c. 30. The difficulty is in deciding "what is substance and what is form," and that is governed by no fixed test, but it is laid down that it "must be determined in every action according to its nature." 1 Bac. Abr., *Amendment and Jeofails*, E. 1; 1 Saund. 81, note 1.

At common law, defects in collateral pleadings, or other matters not preceding the verdict, and not to be proved in order to get a verdict, were not cured by it. Yet those were cured which related to matters necessary to be shown to get a verdict, and hence, after it, are presumed to have been shown. Renner v. Bank of Columbia, 9 Wheat. 581; Com. Dig., *Pleader, Count*, c. 87; Carson v. Hood, 4 Dall. 108; 1 Sumn. 314; 1 Gall. 261; 1 Wils. 222; Burr. 17, 25; Cotterel v. Cummins et al., 6 Serg. & Rawle, 348; 1 Sumner, 319; 16 Conn. 586; 11 Wendell, 375; 7 Greenleaf, 63. But these defects in collateral matters, as here, when they relate to form, are as fully cured by the statutes of jeofails as those connected with the verdict are by intendment at common law. Stennel v. Hogg, 1 Saunders, 228, note 1; Dale v. Dean, 16 Conn. 579. Any omission like this would certainly be amendable below, and some cases have gone so far as to hold, in error, that any defect amendable below will be considered as actually amended. Cummings v. Lebo, 2 Rawle, 23.

In conclusion on this point, this court, by Catron, Justice, in the writ of error before named, of Stockton et al. v. Bishop (4 How. 164), stated, that "it must be admitted that Congress acted wisely in declaring that no litigant party shall lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring that, to save the parties' rights, the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance."

After this, it would seem hypercritical, and contrary to the whole spirit of the statutes of jeofails both of the United States and of Mississippi, to allow an exception so contrary to legal presumption as this to be sustained. Nor does it promote the ends of justice to let parties lie by and not take exceptions, and afterwards reverse judgments for omissions, which, if noticed at the time, would have been corrected. McCready v. James, 6 Wharton, 547. And this court, where the issues were three, and the verdict and judgment not separate on each, but general on all, and the objection was taken on the writ of error, in

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Roach v. Hulings, 16 Peters, 321, said, by Daniel, Justice, — "Objections of this character, that are neither taken at the usual stage of the proceedings nor prominently presented on the face of the record, but which may be sprung upon a party after an *apparent waiver* of them by an adversary, and still more *after a trial* upon the merits, can have no claim to the favor of the court, but should be entertained only in obedience to the strictest requirements of law"; and they were in that case accordingly overruled or considered as cured.

Another ground for affirming the judgment, which the plaintiff in error cannot easily overcome, is, that if the three counts to which the special plea is filed cannot be sustained, the defendant in error has obtained a verdict on all the counts; thus showing, at least, that there was no valid defence to the others. And if those three were conceded to be bad, the others are good, and, notwithstanding a verdict and judgment on all, the latter must not in such case be reversed on error. By an express statute in Mississippi, passed June 28th, 1842, one good count, though others are bad, will sustain a judgment. Hutch. Code for Miss., ch. 5, art. 1. This is not a peculiarity confined to Mississippi, but a like rule prevails in several other States. 2 Bibb, 62; 2 Litt. 100; 2 Bay, 204; 2 Hill, 648; 1 Blackf. 12; 1 Stewart, 384; 2 Connect. 324. And though in some it is otherwise (1 Caines, 347; 11 Johns. 98; 9 Mass. 198), and is otherwise in England (Grant v. Astle, Doug. 703), yet it has been regretted by some of her eminent jurists as "inconvenient and ill-judged."

If this provision, then, in Mississippi, should be regarded as a rule of practice, it existed there when the last process act, of May, 1828, passed, and hence, by acts of Congress and the rules of our Circuit Courts, binds them; but if it be a right conferred by her statute, it equally must govern us, by the Judiciary law of 1789, in all cases tried like this in that State. 16 Peters, 89, 303.

But, beside these reasonings and views, to some of which a portion of the court except, there exists another ground for affirming the judgment below, which appears to us fully established both on principle and adjudged cases. The first fault in the pleadings connected with the demurrer seems to have been committed by the defendant himself, and no reason appears on the whole record why the original judgment should not have been rendered against him on that ground. His only defence set up was the statute of frauds and perjuries. This statute was pleaded specially; but, on the facts and the law, it does not seem to have been applicable to the case. The case was a transaction of money paid by the plaintiff on account of the defend-

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ant, and must have been considered by the court and jury as done under an original undertaking to repay it in a particular way, which the defendant had not fulfilled, and which was not within the provisions of the statute. The defendant was misled, by the mode of payment being special and to a third person, into an impression that the original promise was to a third person. The suit is not brought by the third person, to whom the original plaintiff owed a debt, nor was the promise made to a third person; but it is brought by the person who advanced money on account of the defendant, on a consideration moving from him alone, and on the promise made to him alone for its payment in a particular manner. See, on this, *Read v. Nash*, 1 Wilson, 305; 2 Leigh's N. P. 1031; *King v. Despard*, 5 Wendell, 277; *Towne v. Grover*, 9 Pick. 306; *Hodgson v. Anderson*, 3 Barn. & Cres. 842.

This was virtually, therefore, an undertaking by the defendant to pay his own debt, but simply specifying a particular manner of doing it; and unless it was found at the trial that the statute of frauds did not apply, it is to be presumed that a recovery would not have been had before the jury, where it was competent to make this an objection.

The matter of the plea, then, having been clearly bad, it appears to be well settled, that, when a demurrer is filed to a replication, if the plea is bad, judgment ought to be given for the plaintiff. *Anon.*, 2 Wilson, 150; *Semble*, Moor, 692; *Com. Dig., Pleader, Proceedings in Error*, 3 B. 16; 1 Levinz, 181. The whole record connected with the demurrer is open on the writ of error, and judgment goes against the earliest fault. *Brèese*, 207; *Morgan v. Morgan*, 4 Gill & Johns. 395.

In regard to the suggestion, that the demurrer might have applied to some other objection than the statute of frauds, either in the plea, or, going back to the declaration, some defect there (as the first defect bad on general demurrer is the fatal one, 1 Chit. Pl. 647), it is enough to say that no other appears, then or now, to have been pointed out, and none is intimated in the argument for the plaintiff in error.

If is very doubtful, also, if, in this particular case, a defect in the declaration would be considered at all on this demurrer, as the general issue is pleaded to all of the declaration covering these three special counts. And an issue in fact and a demurrer cannot both be allowed to reach the same count. *Bac. Abr., Pleas and Pleading*, n. 1; 2 Blackf. 34; 5 Wendell, 104. If there be an exception to this rule, it must be by some local law or practice not existing here. 1 Litt. 4; 4 Munford, 104.

From the whole record, therefore, it appears that the judgment below in favor of the plaintiff was probably correct, even

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if the demurrer had not been waived, and in this event it is clear that the judgment should not, on this writ of error, be reversed. Hobart, 56; Com. Dig., *Pleader, Demurrer*, Q. 2; Saunders v. Johnson, 1 Bibb, 322; 6 Monroe, 295, 606; Phelps v. Taylor, 4 Monroe, 170; *Semble*, 3 Bibb, 225; McWaters v. Draper, 5 Monroe, 496; Hardin, 164. In Foster v. Jackson, Hobart, 56, the opinion says, "It is the office of the court to judge the law upon the whole record." The other cases cited show, that in writs of error, as well as demurrers, the same rule prevails.

The propriety of our conclusions in this case becomes more manifest when we consider that a reversal of the judgment would be of no use to the original defendant; because, if reversed, the order here could not be to render judgment for the defendant, but to have a record made of the waiver or decision of the demurrer, if either occurred, and if not, then a joinder in demurrer and an opinion below on the question presented by it, and which opinion, as already shown, must probably be for the plaintiff, and then the same judgment be entered again on the verdict which exists now. McGriffin v. Helson, 5 Litt. 48; 2 Strange, 972; Jackson v. Runlet, 1 Woodb. & Min. 381.

Finally, so far as any presumptions or doubts on any of these considerations should operate against either party in forming our conclusions, we are unable to see any thing in the acquiescent conduct of the original defendant before the judgment, or in the merits of his original defence, or in his writ of error, brought after such an uninterrupted silence and assent for years, which entitle him to any peculiar favor.

The plaintiff in error, likewise, must always make out his case clearly and satisfactorily, as every reasonable intendment should be in favor of a judgment already rendered. Fentriss v. Smith, 10 Peters, 161; Lander v. Reynolds, 3 Litt. 16; Lou. Code of Pract. 909, note, and cases there cited; 3 Martin (N. S.), 29; 15 Louis. 480, &c. This not having been done in the present case, we think that the judgment below must be affirmed.

Mr. Chief Justice TANEY.

I think the judgment of the District Court may be supported, on the ground that the decision on the demurrer had become immaterial after the verdict on the general issue. The special plea out of which the demurrer arose applied only to three counts. There was a fourth count, to which no defence was made except by the plea of the general issue; and according to the law and practice of Mississippi, one good count is sufficient to support the judgment when there are several counts in a declaration, and the others bad. And after the verdict on the

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general issue, the decision of the demurrer was immaterial, and the judgment must still have been for the plaintiff even if the demurrer was decided for defendant. The omission to dispose of an immaterial issue is not a ground for reversing a judgment, as the decision of such issue could not influence the judgment of the District Court. But I do not concur in the other portions of the opinion, and think that many of the positions taken in it cannot be supported.

Mr. Justice CATRON concurs with the Chief Justice.

Mr. Justice DANIEL.

Regarding the opinion just delivered as in direct opposition to the very canons of pleading at law, I feel constrained to declare my dissent from it. I cannot subscribe to, and can hardly comprehend, a doctrine of presumptions, which, in proceedings at law and on questions of pleading, infers that the parties or the court have acted in direct contravention of the facts apparent upon, and standing prominently out upon, the record, operating by such presumption a false feature of the record itself. In this case the defendant has tendered an issue in law to the replication to the third plea; the record discloses the fact, that this issue has never been tried; it is therefore undeniable that there is a chasm in the proceedings, and that the court has not passed upon the whole case. If presumption can be admitted to warrant the conclusion that this demurrer was withdrawn, where shall such presumption end? Would it not be equally regular to presume that any other plea or issue on the record had been withdrawn? Then, if any other source than the record itself can be resorted to in order to ascertain what was in truth involved in the trial, conjecture or evidence *aliunde* must be introduced to determine; and that which, by legal intendment, is the only evidence or proof of the proceedings, the record, becomes the weakest of all proof, or rather becomes no proof at all. I think the judgment should be reversed, and the cause remanded for a trial on all the issues of law and of fact.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and damages at the rate of six per cent. per annum.